

present matter, even though Rep. Rokita is an incumbent Member of the U.S. House of Representatives who has, at all times, complied with the Commission's registration and reporting requirements.

The "testing the waters" regulation is an exemption from the otherwise applicable registration and reporting requirements that is specifically addressed to individuals who are not yet federal candidates. The Commission's regulation provides that "[f]unds received solely for the purpose of determining *whether an individual should become a candidate* are not contributions." 11 C.F.R. § 100.72(a) (emphasis added). Then, "[i]f the individual *subsequently becomes a candidate*, the funds received are contributions subject to the reporting requirements of the Act." *Id.* (emphasis added). During the period at issue here, Representative Rokita was already a registered federal candidate, regardless of whether he decided to run for the U.S. Senate. His principal campaign committee, Hoosiers for Rokita, has filed regular quarterly reports with the Commission since 2010.

It makes no conceptual sense to ask whether Representative Rokita was "testing the waters." The "testing the waters" provision is a limited reporting exemption for individuals who are not yet federal candidates and who do not already report their financial activity. Representative Rokita never claimed any such reporting exemption.

II. Even If The "Testing the Waters" Regulation Applies, Rep. Rokita's Activities Did Not Evidence an Unambiguous Private Determination to Seek Election to the U.S. Senate

Even if the Commission believes the "testing the waters" regulation is applicable in this matter, its applicability is necessarily limited to determining whether "an individual has decided to become a candidate" for an office that he does not currently hold, thereby triggering an obligation to file a new or amended Statement of Candidacy. Representative Rokita's consideration of a U.S. Senate candidacy did not change his quarterly reporting obligations in any way. Any funds that Representative Rokita raised or spent during the period when he was considering whether to become a candidate for the U.S. Senate were timely reported by Hoosiers for Rokita. *See* MUR 6735 (Sestak); MUR 5703 (Rainville).

The evidence cited in the Complaint does not demonstrate that Representative Rokita had made the private determination to run for the U.S. Senate under the Commission's standard "testing the waters" analysis. To the contrary, Rep. Rokita's activities are entirely consistent with past cases in which the Commission determined that an individual's activities fell within the proper scope of the "testing the waters" regulation.

A. Website Materials

The Complaint alleges that "[o]n February 5, 2017, Rep. Rokita posted an article to his campaign website entitled "Indiana's U.S. Senate Race Quickly Heats Up," and claims this article "discusses his run for United States Senate," "highlights his candidacy for United States Senate," and is "about his candidacy for the United States Senate." *See* Complaint at 1, 4. Each

of these three characterizations is a false and deliberate misstatement of fact intended to deceive and mislead the Commission. The material in question was posted to the "News" section of Representative Rokita's website, which includes a wide variety of postings about Representative Rokita and matters of interest to Indianans. With respect to the posting referenced in the Complaint, the portion concerning Representative Rokita is as follows:

Also Tuesday, Rep. Todd Rokita (R-Ind.) left the door open for a potential run.

"Sen. Donnelly needs to quickly decide if he is going to work with President Trump and Republicans to get the country back on track, or if he is going to continue obstructing efforts to make America great again," Rokita said in a statement to FOX 59. "If he decides to stand with Chuck Schumer and Washington liberals against Hoosiers, we will be able to choose a new conservative senator in 2018, and *I will continue to evaluate the best role for me in that effort.*"

Hoosiers for Rokita, News, *Indiana's U.S. Senate Race Quickly Heats Up*, Feb. 5, 2017, <http://www.toddrokita.com/posts/news/looking-ahead-2018-senate-race> (emphasis added).

These quoted statements very obviously do not indicate that a private determination had been made to run for the U.S. Senate as Representative Rokita expressly stated that he "will continue to evaluate" whether to run for the Senate.

Representative Rokita is a member of Indiana's Congressional delegation who is certainly entitled to publicly comment on the positions taken by Indiana's U.S. Senators. Regardless, the Commission has previously concluded that statements concerning a potential opponent do not establish candidacy for purposes of the "testing the waters" regulation. See MUR 6501 (Brunner), First General Counsel's Report at 8; MUR 6430 (Daines), Factual & Legal Analysis at 8-10 (criticism of potential opponent does not necessarily establish candidacy); MUR 5661 (Butler), First General Counsel's Report at 14-16 (concluding that brochure critiquing incumbent during "testing the waters" period does not establish candidacy).

Prior to announcing his candidacy for the U.S. Senate, neither Representative Rokita nor his campaign committee distributed any general public political advertising that publicized an intention to campaign for the U.S. Senate.

B. Statements Made

The Complaint alleges that "[o]n or around April 20, 2017, Rep. Rokita stated 'I'm definitely the best candidate against [U.S. Senator from Indiana] Joe Donnelly,'" and asserts that this statement "generally reflect[s] the individual's decision to become a candidate." Complaint at 2, 4. Again, the Complainant's characterization is inaccurate. The brief statement cited is excerpted from a longer article based on a reporter's interview with Representative Rokita. The reporter's characterizations of Representative Rokita's state of mind and intentions must be separated from Representative Rokita's actual statements. See MUR 6501 (Brunner), First General Counsel's Report at 7-8 ("Under the Commission's regulations, only statements made or

authorized by the potential candidate may indicate that he individual is no longer 'testing the waters.'"). Furthermore, Representative Rokita had no involvement with how any media source referred to him. See MUR 6224 (Fiorina), Factual and Legal Analysis at 10.

The statement referenced in the Complaint was made in the context of a discussion about the large field of potential U.S. Senate candidates, and Representative Rokita was clearly expressing his belief that of the individuals identified as potential candidates for the Republican Senate nomination, he would be "the best candidate against Joe Donnelly." Taken in context, Representative Rokita clearly was not declaring himself a candidate for the U.S. Senate. See MUR 6501 (Brunner), First General Counsel's Report at 7 ("Brunner's casual reference to a 'campaign' – when indefinitely stating 'We're not going to run out of gas on this campaign' – by itself is not sufficient to establish candidacy."). In fact, during the same interview, Representative Rokita explicitly said that he was still considering a Senate campaign, stating, "If we get in, we're in it to win." Representative Rokita's statements during this interview are comparable to statements the Commission previously found to be consistent with testing the waters. See MUR 6472 (Gooch), Factual and Legal Analysis at 8 (finding the statement "If I feel that I'm the best candidate and I can beat him then I would" consistent with testing the waters status).

The Complaint also alleges that "[a]t the end of May, Rep. Rokita stated that an 'official decision' on whether he will run for the Senate will come 'in the next couple months,' despite posting an article about his candidacy in early February." Complaint at 3. As noted above, the Complainant's claim that the article posted was "about his candidacy" is a deliberate falsehood. An individual's statement that an "official decision" is forthcoming is not unusual and in no way falls outside the ambit of the "testing the waters" regulation. For example, in 2007, former Senator Fred Thompson said of a potential Presidential candidacy, "we're going to be making a statement shortly that will cure all of that." The Commission found this statement to be consistent with the "testing the waters" regulation. See MUR 5934 (Thompson), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub at 2.

C. Funds Raised

The Complaint alleges that "Rep. Rokita has been amassing a large amount of funds in recent months." Complaint at 2. Neither the amount of funds raised during the period in which Representative Rokita considered whether to run for the U.S. Senate, nor the duration of that period, is inconsistent with the conclusion that Representative Rokita had not yet decided to become a Senate candidate. As the Office of General Counsel explained in a recent matter:

Based on prior Commission precedent, we believe that neither the amount Sestak raised nor the time he has spent doing so would be sufficient without more to conclude Sestak had become a candidate. First ... the Committee's *thirteen months of fundraising* ... is not necessarily a "protracted period of time" for the purpose of determining candidacy.

MUR 6735 (Sestak), First General Counsel's Report at 13 n.11 (emphasis added).

The Complaint notes that "Rep. Rokita's campaign recently announced that it has raised more than \$300,000 in contributions during the first quarter of this year and has more than \$1.5 million in cash on hand." Complaint at 2. Representative Rokita is an incumbent officeholder who was a candidate for re-election to the U.S. House at the time. Regardless, the Commission has repeatedly found that similar amounts are not inconsistent with "testing the waters" and do not demonstrate that a private determination to run for office has been made. For example, in MUR 6224 (Fiorina), the Commission determined that raising over \$600,000 "does not appear to exceed what could reasonably be expected to be used for exploratory activities based on the Commission's decisions." MUR 6224 (Fiorina), Factual and Legal Analysis at 6.

D. Fundraising Consultant

The Complaint also alleges that "Rep. Rokita has added a well-known Republican fundraiser and former politician, Dan Dumezich, to serve as the Chairman of his Statewide Campaign Finance Committee." Complaint at 2. The Commission has repeatedly held that hiring consultants is legitimate "testing the waters" activity. *See, e.g.*, MUR 6501 (Brunner); MUR 6224 (Fiorina); MUR 5934 (Thompson); Advisory Opinion 1981-32. The Complaint also asserts that establishing a "Statewide Campaign Finance Committee" "indicates that Rep. Rokita has already decided to run for United States Senate." Complaint at 4. There is, of course, nothing unusual about a Member of the U.S. House of Representatives raising funds on a statewide, or even national, basis. Nevertheless, gauging a potential candidate's ability to fundraise on a broad basis is entirely consistent with "testing the waters."

III. Conclusions

Representative Rokita did not violate any Commission reporting requirements during the period in which he considered whether to run for the U.S. Senate. Upon making the private determination to run for the Senate, Representative Rokita filed all required paperwork within the required time frame.

For the reasons set forth above, the Commission should dismiss this Complaint.

Sincerely,



Jason Torchinsky
Michael Bayes